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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 969

EDITH R. REYNOLDS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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1. It is significant that the Government suggests nothing in defense of the trial court's action of peremptorily annulling the pre-trial order, wherein the Government had stipulated that the excluded evidence should be admitted without objection.

The Government also ignores the necessary effect and interpretation of Federal Rule 43 (a).

2. Anything in the Government's brief to the contrary notwithstanding, Mr. Reynolds was qualified by the Government as an expert witness and, as such, his opinion solicited by the Government (Tr. pp. 89 *et seq.*) and he was adversely interested in that he was wide open to a fraud claim by the Government for not reporting the taxable

transfer in the marital settlement (Aplts.' Br., pp. 30-2, Reply Br., 17-8, Pet. for Rehearing, p. 13).

In 1941 and 1942 the Third and Second Circuits had held that such a transfer in a marital settlement as was made by Mr. Reynolds in 1947, was a taxable transaction. In both cases certiorari was denied. That continued to be the accepted law until 1961 (fourteen years after 1947) when the question was again agitated, which agitation was set at rest by this Court in *Davis* v. *United States*, 370 U. S. 65, in accordance with the prior cases (Reply Br., pp. 17-8).

Mr. Reynolds never reported the transfer. No one knew better than he that he was faced with a fraud claim (Aplts.' Br., pp. 30-2, Reply Br., 17-8, Pet. for Rehearing, p. 13). In any event, the jury surely could have found that Reynolds' fear of such a claim by the Government influenced his testimony.

The Government's statement at page 7 of its brief: "The trial judge understood Mr. Reynolds to be taxpayer's witness (see I. R., 25a) and the taxpayer did not claim otherwise" is utterly erroneous. The taxpayer was forced to take Mr. Reynolds' deposition to prove certain financial facts (e.g., the earnings of the businesses, etc.). Petitioner never sought Mr. Reynolds' opinion as to anything. It was the Government who qualified him as an expert and used him as such (Tr., p. 89, *et seq.*). There was never any dispute about it and until now no claim to the contrary.

3. The one thing clearly established in the cases cited by the Government at pages 4 and 5 of its brief is that no court has ever before excluded as a "comparable" sales of the same shares.* In all of the cases cited as "too

* Petitioner sorrowfully notes that the Government has continued its "win at all costs" attitude in the misleading footnote reference (Br., p. 5). The *Elmhurst* case admitted evidence of subsequent sales (fifteen years subsequent) saying: "* * * Prices obtained in the latter years (1926-8) may be compared with those received in the earlier ones (1909-13)—they were for like things." 300 U. S. 37, 40.

remote" by the Government, the sales were in fact admitted and considered by the triers of the facts, and given more or less weight as the triers of the fact deemed proper. But in the case at bar the jury was precluded from all opportunity of discharging its constitutional function.

The Government claims only (Br., p. 4) that the trial court's discretion is limited "to exclude matters having only slight bearing on the controversial issues." That is our position (Pet. for Cert., p. 11). But here the trial court excluded not only the prime "comparables" but also all "comparables" and proof of earnings and thereby effectively eviscerated the plaintiff's case.

4. In summary, this taxpayer has been held liable for over $200,000 when, we confidently submit, no jury in possession of all the relevant facts, would hold that she owed one American penny. Such an unjust deprivation of property is so substantial as to change her and her children's way of living—it equals a deprivation of liberty or confinement for a period in a penitentiary. To be blunt, no taxpayer can be assured a fair trial if the arbitrary action of the trial court is permitted to stand. We again suggest that this Court may summarily reverse.

Respectfully submitted,

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